BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JODENE BABUE	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,033,760
U.S.D. 229	)	
Self-Insured Respondent	)	

ORDER

Respondent appeals the June 25, 2007 Preliminary Decision of Administrative Law Judge Robert H. Foerschler. The ALJ, after determining that there existed a dispute as to claimant's injury and its source, ordered as follows: "Bernard Abrams, M.D., a qualified neurologist, in her area, is appointed to examine her and her records and provide his opinion as to the source and extent of her hand problems and her treatment needs".

Claimant appeared by her attorney, Michael J. Joshi of Lenexa, Kansas. Respondent, a self-insured, appeared by its attorney, Christopher J. McCurdy of Overland Park, Kansas.

The Board adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the Transcript of Preliminary Hearing held on June 21, 2007, with exhibits; and the documents filed of record in this matter.

ISSUE

Did claimant sustain personal injury by accident arising out of and in the course of her employment with respondent? Respondent argues the Preliminary Decision of the ALJ is contrary to the medical reports of William H. Tiemann, M.D. Claimant contends the appeal of respondent is premature as the Preliminary Decision of the ALJ makes no finding regarding whether claimant's injuries arose out of and in the course of her employment with respondent. Rather, the Preliminary Decision of the ALJ merely refers claimant to Dr. Abrams for an opinion regarding the cause of claimant's injuries.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the Preliminary Decision should remain in full force and effect, and the appeal of respondent should be dismissed as premature.

Claimant began working for respondent on January 27, 2006, as a daytime custodian. Claimant worked exclusively at Leawood Middle School, where she was the only daytime janitor. Her job responsibilities included setting up and breaking down 18 to 22 tables and 90 chairs, cleaning up after breakfast, cleaning bathrooms, washing windows, mopping floors, setting up for lunch with approximately 20 tables and 120 chairs, cleaning up after lunch, taking out trash and, if necessary, shoveling snow.

In April, 2006, claimant began noticing problems with her wrists and elbows. She first noticed it, primarily, when she was pulling the chairs down and pulling them apart. She described the chairs as heavy, and noted they were hard to separate. The problems were reported to respondent, but no action was taken. Claimant reported the problems several times, and finally went to respondent's Human Resources department with the problem. Jean Higgenbotham, in Human Resources, contacted Sid Cumberland, at Safety and Security, regarding the problem. Claimant was referred to Occupational Health Services (OHS), where she came under the care of William H. Tiemann, M.D.

Dr. Tiemann first examined claimant on January 11, 2007. At that time, he diagnosed claimant with tendinosis of the wrist, with extension into the elbows; and mild carpal tunnel syndrome bilaterally. Dr. Tiemann volunteered that the carpal tunnel syndrome was not work related, as claimant's job was not truly repetitive, but was, instead, a result of claimant's "constitutional". Dr. Tiemann ordered claimant to wear splints, both at home and at work. At the time of the second visit on January 18, 2007, Dr. Tiemann noted the diagnosis of tendinosis of the wrist was compatible with work-related activities, but the carpal tunnel syndrome was again noted to be non-work related. The treatment recommendations included cold packs, over-the-counter pain medication and wrist splints, which claimant requested be replaced, as her old ones were worn out.

The next examination occurred on January 31, 2007. At that time, claimant reported the elbow pain had essentially resolved, although there remained slight tenderness at the proximal flexor muscles. The carpal tunnel syndrome remained symptomatic. Dr. Tiemann noted the carpal tunnel syndrome was related to claimant's constitutional, with indications in his report that age and hormonal factors were the cause.

Claimant testified that she had no history of carpal tunnel syndrome or tendinosis before coming to work for respondent. She also noted the problems improved over the summer, with a worsening noted with the start-up of school in the fall.

Claimant argues that the ALJ made no finding with regard to the cause of claimant's problems. Instead, the ALJ merely ordered claimant to undergo another examination with a neutral physician pursuant to K.S.A. 44-516. Respondent argues the Preliminary Decision did not order an independent evaluation. Instead, respondent alleges the record indicates the ALJ found, on the record, that claimant's injuries were compensable.

The ALJ, at the close of the record at the preliminary hearing, when talking to respondent's attorney, made the following statement:

> Well, I'm a little disappointed in the type of report you're giving us here from the Occupational Health Service. It doesn't seem to be supported by any other evidence other than their conclusions about Ms. Babue's age. I guess that's the factor that he's considering.
>
> A person's age does not immunize the employer from having to pay for injuries that they developed or that develop from activities that they do at their work, particularly the work such as Mrs. Babue describes. So I'm going to send her to somebody, an independent doctor that doesn't have quite the cozy relationships with the employer as the occupational people sometimes have."[1]

As noted above, the ALJ in the Preliminary Decision then appointed Dr. Abrams to examine claimant and provide "his opinion as to the source and extent of her hand problems and her treatment needs."[2]

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[3]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[4]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an

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[1] P.H. Trans. at 27-28.

[2] Preliminary Decision at 2.

[3] K.S.A. 2005 Supp. 44-501 and K.S.A. 2005 Supp. 44-508(g).

[4] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

> employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[5]

Not every alleged error in law or fact is reviewable from a preliminary hearing order. The Board's jurisdiction to review preliminary hearing orders is generally limited to the following issues which are deemed jurisdictional:

1. Did the worker sustain an accidental injury?

2. Did the injury arise out of and in the course of employment?

3. Did the worker provide timely notice and written claim of the accidental injury?

4. Is there any defense that goes to the compensability of the claim?[6]

Additionally, the Board may review those preliminary hearing orders where it is alleged that an administrative law judge has exceeded his or her jurisdiction or authority in providing or denying the benefits requested.[7]

> In case of a dispute as to the injury, the director, in the director's discretion, or upon request of either party, may employ one or more neutral health care providers, not exceeding three in number, who shall be of good standing and ability. The health care providers shall make such examinations of the injured employee as the director may direct. The report of any such health care provider shall be considered by the administrative law judge in making the final determination.[8]

The June 25, 2007 Preliminary Decision provides that claimant be examined by a neutral physician and that opinions be rendered by that physician regarding causation and treatment. On appeal from a preliminary hearing, the Board has jurisdiction to review those issues set forth in K.S.A. 44-534a. The Board's authority is limited to review of allegations that the judge exceeded his or her authority or jurisdiction.[9] The ALJ did not order temporary total disability payments or medical treatment. The Preliminary Decision only

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[5] K.S.A. 2005 Supp. 44-501(a).

[6] K.S.A. 44-534a(a)(2).

[7] K.S.A. 2006 Supp. 44-551.

[8] K.S.A. 44-516.

[9] K.S.A. 2006 Supp. 44-551.

provides for the examination of claimant to assist the ALJ in determining the issues. K.S.A. 44-516 allows for the appointment of an independent medical examiner "[i]n case of a dispute as to the injury . . . ."[10] The Board has held previously that this statute allows an order for an independent medical examination in order to assist in the determination of whether an injury arose out of and in the course of a claimant's employment.[11] This Board Member holds the same here and finds this appeal is premature and should be dismissed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[12] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

The appeal by respondent is premature and should be dismissed.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Preliminary Decision of Administrative Law Judge Robert H. Foerschler dated June 25, 2007, remains in full force and effect, and the appeal by respondent is dismissed.

IT IS SO ORDERED.

Dated this ____ day of September, 2007.

BOARD MEMBER

c: Michael J. Joshi, Attorney for Claimant
Christopher J. McCurdy, Attorney for Respondent
Robert H. Foerschler, Administrative Law Judge

[10] K.S.A. 44-516.

[11] *Miller v. Moon's IGA*, No. 1,026,423, 2006 WL 3298945 (Kan. WCAB Oct. 13, 2006).

[12] K.S.A. 44-534a.